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No. 95-1789

Supreme Court, U. S.

FILED

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In The
Supreme Court of the United States
October Term, 1995

CALVIN GREGORY, an individual;
and DOES 1 through 50, inclusive,

Petitioners,

vs.

JOSE R. FLORES and GENIE FLORES,
individually and as husband and wife,

Respondents.

**On Petition For Writ Of Certiorari
To The Supreme Court Of California**

BRIEF IN OPPOSITION

TINA L. RASNOW AND ASSOCIATES
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Jose R. Flores and Genie Flores*

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

Statement of the Case

A. Nature of Action and Relief Sought

Respondents, Jose and Genie Flores, sued Petitioner, Calvin Gregory, for malicious prosecution, negligence, defamation, intentional infliction of emotional distress, negligent infliction of emotional distress, false arrest/imprisonment and injunctive relief based on intentional false statements made by Petitioner to law enforcement and others. Respondents sued Petitioner for maliciously initiating a citizen's arrest and criminal prosecution of Respondent Jose Flores, for an alleged barking dog problem which Petitioner knew never existed. Respondent, sought, and received, an award of general damages, special damages, punitive damages, costs of suit and permanent injunctions. (CT Vol. 1-28 and Exhibit "B" to Petition for Writ of Certiorari ("Petition").)

B. Judgment of Superior Court and Appellate Review

The Superior Court of California, County of Ventura, Honorable Frederick A. Jones presiding, rendered its final judgment for Respondents on return of a jury verdict in the sum of \$12,000, including \$8,000 in punitive damages. Judge Jones further issued a permanent injunction to prevent Petitioner from further harassing Respondents. (See Exhibit "B" of Petition).

The Court of Appeal, Second Appellant District, Division 6 affirmed the verdict, and the California Supreme Court denied review.

C. Statement of Facts

In or about June, 1992, Respondents moved into a single family residence in the Wildwood community of Thousand Oaks, California, next door to Petitioner. Respondents owned a passive and well mannered dog. (See Appellate Opinion ("AO") at page 1, attached as Exhibit "A" to Petition).

Petitioner first confronted Jose Flores regarding the location in which Mr. Flores parked his truck on the street in front of his home. (AO pg. 2). Following this incident Petitioner mailed animal control literature and included messages about surgically debarking dogs, which alarmed Respondents. (AO pg. 3). The Flores investigated whether their dog created a problem by inquiring of other neighbors, observing the property from a nearby greenbelt, and setting up a sound activated tape recorder (*Ibid.*). Animal control also conducted an investigation and did not hear the dog bark. Seven neighbors signed a petition stating that the dog was quiet and in no way a nuisance to the neighbors. (*Ibid.*)

Petitioner insisted the dog "constantly barked and howled". He filed a complaint with the police department and insisted upon a citizen's arrest of Mr. Flores despite the arresting officer's warning that there was insufficient cause to make an arrest and that Petitioner could be civilly liable for doing so. Despite the admonitions from the arresting officer, Petitioner insisted on making the arrest in front of several of the Flores' neighbors. (AO pg. 4).

Mr. Flores had to retain an attorney and appear in criminal court, he and his wife were humiliated by press coverage and suffered a loss of sleep and severe headaches. The City Attorney eventually dismissed the action under California Penal Code Section 1385, subdivision

(a). (*Ibid.*) Testimony from a multiplicity of neighbors indicated a history on the part of Petitioner of making complaints about neighbors' dogs (AO pg. 4-5).

The evidence substantially showed, and the jury found, that the Flores' dog rarely barked: "Substantial evidence supported the jury finding that Gregory acted with malice and defamed respondents." (AO pg. 11).

ARGUMENT

I.

THERE IS NO FEDERAL QUESTION OR CONSTITUTIONAL ISSUE BEFORE THE COURT

Petitioner would have the United States Supreme Court retry the facts of this case to reach a different conclusion than that reached by the jury, namely that Calvin Gregory maliciously lied to police to have Mr. Flores arrested. After hearing from numerous witnesses on behalf of respondents, and no corroborating witness on behalf of petitioner, the jury concluded that the Flores' dog rarely barked, and that Mr. Gregory, acting with malice, knowingly filed a false police report in order to get even with his neighbor. (AO pg. 11).

False reports to police officers are not privileged, nor are they subject to First Amendment protection. As this Court stated in *McDonald v. Smith*, 472 U.S. 479, 105 S.Ct. 2787, 86 L.Ed.2d 384 (1985):

Although the values in the right of petition as an important aspect of self-government are beyond question, it does not follow that the Framers of the First Amendment believed that the Petition Clause provided absolute immunity from damages for libel. (*Id.* at p. 483, 2790).

The *McDonald* Court, citing *White v. Nicholls*, 3 How. 266, 11 L.Ed. 591 (1845), stated:

The Court, after reviewing the common law, concluded that the defendant's petition was actionable if prompted by "express malice," which was defined as "falsehood and the absence of probable cause." *Id.*, at 291. Nothing presented to us suggests that the Court's decision not to recognize an absolute privilege in 1845 should be altered; we are not prepared to conclude, 140 years later, that the Framers of the First Amendment understood the right to petition to include an unqualified right to express damaging falsehoods in exercise of that right. (*McDonald v. Smith*, *supra* at p. 484, 2790).

"The right to petition is guaranteed; the right to commit libel with impunity is not". (*Id.* at 485, 2791)

Petitioner's entire argument rests on a false premise, namely that the Flores' dog created a nuisance and therefore petitioner's arrest of respondent was privileged. However, the jury, based on overwhelming evidence, found to the contrary. The jury determined that Mr. Gregory had no reasonable basis to arrest Mr. Flores, and that his citizen's arrest was undertaken with malice and with the intent to defame and injure respondent. (AO pg 11). According to this Court in *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966), "[M]alicious libel enjoys no constitutional protection in any context". (*Id.* at p. 63, 663) Under numerous Supreme Court decisions, if a defamatory statement is made, with malice, the privilege claim is defeated. (See for example, *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964); *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979); *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978).)

As stated in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984), citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789 (1974), "There is 'no constitutional value in false statements of fact.'" (*Keeton* at p. 776, 1479)

II

THE INJUNCTION DOES NOT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHTS

The trial court issued a carefully tailored injunction upon finding that Petitioner knowingly and willfully engaged in a course of conduct that seriously alarmed, annoyed and harassed Respondents, and that Respondents actually suffered substantial emotional distress. (AO pg. 13). This conduct included filing false reports with animal control and the sheriff, denting the Flores' truck, placing Mr. Flores under citizen's arrest, and mailing threatening literature. (*Ibid.*) Petitioner has no constitutional right to harass respondents, lodge false reports with the police and the city, make unlawful arrests, contact respondents, or disturb their peace. (See *Rowan v. United States Post Office Department*, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970).).

III

CONCLUSION

Petitioner has misrepresented the facts of the case in an attempt to create a federal question, where none exists. This case is a simple neighbor dispute, which has no place in the nation's highest court. Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Dated: May 31, 1996

Respectfully submitted,

TINA L. RASNOW